BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA A. ELKINS Claimant VS. **COWLEY CO. COMMUNITY COLLEGE** Respondent AND **KANSAS ASSOC. OF SCHOOL BOARDS** Insurance Carrier	)	Docket No. 253,708

ORDER

Respondent appealed Administrative Law Judge John D. Clark's Award dated October 8, 2001. The Board heard oral argument on April 2, 2002, by telephone conference.

APPEARANCES

Claimant appeared by her attorney, Martin Updegraff. Respondent and its insurance carrier appeared by their attorney, Anton Andersen.

RECORD AND STIPULATIONS

The Board has considered the record and has adopted the stipulations listed in the Award. At oral argument before the Board, the parties additionally stipulated claimant was entitled to temporary total disability compensation from January 12, 2000, through April 10, 2000.

ISSUES

The Administrative Law Judge determined claimant suffered accidental injury arising out of and in the course of her employment on January 12, 2000. Claimant was awarded

a 35.5 percent work disability based upon the average of a 27 percent task loss and a 44 percent wage loss.

Respondent argues claimant suffered an intervening accidental injury at home on May 18, 2000, while trimming shrubs. Accordingly, respondent argues the Administrative Law Judge's decision should be reversed because claimant did not sustain accidental injury arising out of and in the course of her employment. In the alternative, respondent argues claimant is limited to her functional impairment because after she was released from treatment without restrictions, she did not return to work and instead resigned from her employment with respondent. Respondent further argues that if claimant is entitled to a work disability the wage loss opinions should be averaged just as the task loss opinions were averaged by the Administrative Law Judge. Such an average would result in a 26.5 percent wage loss. Lastly, respondent argues the Administrative Law Judge erred in ordering respondent to pay Dr. David C. Martinez because his treatment of claimant was not authorized. Accordingly, respondent argues Dr. Martinez is only entitled to unauthorized medical payment of $500.

Conversely, the claimant contends the Administrative Law Judge erred in averaging the task loss component of the work disability formula because the only testimony from a physician regarding task loss was provided by Philip R. Mills, M.D., which utilized Mr. Molski's task list and concluded claimant could no longer perform 7 of the 22 tasks. Accordingly, claimant argues she is entitled to a 31.8 percent task loss. Claimant further argues she is entitled to temporary total disability benefits from January 12, 2000, through April 10, 2000. Lastly, claimant contends the Administrative Law Judge should be affirmed in all other respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Claimant had been employed as a custodian for Cowley County Community College for over eight years. During her employment she had suffered prior incidents of low back injury.

Claimant testified she had injured her back while lifting a television set off the floor and turning to set it onto a table sometime in '94 or '95. Claimant was treated by Dr. Hennes, a chiropractor, and was released to return to work without restrictions. Claimant again injured her back in 1997 picking up something off the floor. Claimant was again treated by Dr. Hennes and released to return to work without restrictions. Claimant missed several weeks of work because of those injuries.

It is undisputed claimant suffered an injury at work on January 12, 2000. Claimant was collecting the trash throughout all of the buildings to put into one large bag. Claimant stepped off the patio area with two large sacks of trash when her foot slipped in the gravel but claimant caught herself from falling all the way down. Claimant felt a burning sensation in her lower back. Claimant had been stripping wax from the floors and redoing them and her back was sore from that work before she slipped and injured her back.

Claimant locked up the school and left around 1 a.m. The next day she advised Mark Britton, Director of the Mulvane Center, what had happened and that her lower back was hurting. Claimant told Mr. Britton that she was going to see a doctor. Mr. Britton did not object and told claimant to let him know what she found out.

Claimant was taken off work by Dr. Martinez and the off-work slip was taken to the respondent. Claimant treated with Dr. Martinez for about two weeks. Claimant was then advised by respondent's human resource director that respondent would not pay for the chiropractic treatment. Claimant was then referred for treatment with Dr. Jerry L. Old.

When Dr. Old first saw claimant on February 10, 2000, she was complaining of low back pain with no radiation into the legs. The doctor diagnosed claimant with a low-back strain. Claimant was placed in a physical therapy program and medication was prescribed. X-rays were also taken on February 10, 2000, which revealed a narrowing at L5-S1. Claimant felt the physical therapy improved her condition. On April 10, 2000, Dr. Old concluded claimant had basically normal range of motion, her low back strain had resolved, she had reached MMI, and she was released to return to work without restrictions. When Dr. Old released claimant without restrictions on April 10, 2000, the claimant testified she was feeling really good.

Although claimant was released without restrictions, she testified the doctor and therapist both advised her that if she intended to be able to lift her grandchild she would be better off if she found a different type of work. Dr. Old admonished claimant that she would probably have problems as long as she continued with her custodial work.

Claimant decided not to go back to respondent and perform the same type of work. Claimant felt she couldn't do her job and was afraid she would reinjure her back. Between April and May 18, 2000, claimant was working on her computer skills and carrying on normal daily activities such as working around the house. Claimant testified she felt good after finishing the physical therapy and wasn't having any trouble with her back.

On May 18, 2000, claimant was at home trimming the hedge with a small electric hedge trimmer that weighed approximately three pounds. Claimant testified she had been trimming for approximately 20-25 minutes. When she finished with the hedge trimming, her lower back was hurting again. Claimant again had burning-type soreness in her lower back in the same place she had previously experienced problems. Claimant testified after

the incident trimming the hedge, she had some pain and radiation into her legs. Claimant testified the pain she experienced was worse than how she felt after the injury at work.

After the May 18, 2000, incident at home, claimant returned to see Dr. Old the next day, May 19, 2000. Dr. Old's medical records indicated claimant presented a history of pruning a hedge at home and her back pain flared up once again. Claimant related to the doctor that her pain was almost as severe as before, if not more so. Claimant was also experiencing pain radiating down into her right leg and sometimes in the left leg.

Dr. Old performed a physical examination of the claimant and noted her range of motion had decreased significantly. The doctor's impression was "Recurrent low back pain." The doctor suggested an MRI scan, told claimant to continue taking Ibuprofen for the pain, and to rest a considerable amount of time at home.

Claimant then requested a preliminary hearing to receive additional treatment. Claimant argued the hedge trimming incident was a temporary flare-up of her preexisting condition and a natural and probable consequence of her work-related injury. Respondent's position was the claimant did not have any radiation into her legs from the January 2000 incident but she did have additional symptoms in her legs after the trimming incident. The Administrative Law Judge granted claimant's request for medical treatment. On appeal the Board affirmed the Administrative Law Judge and cited Dr. Old's May 19, 2000, medical note which indicated recurrent low back pain.

Dr. Old testified he was expecting to find a disc problem when he referred claimant for the MRI. Claimant's MRI was done on September 22, 2000, and revealed mild degenerative disc changes at L5-S1, no spinal stenosis or nerve root impingement. Dr. Old saw the claimant on October 6, 2000, after the MRI and opined there was nothing else to do medically for the claimant.

Dr. Old opined the claimant aggravated her back as a result of the hedge trimming at home just prior to being seen on May 19, 2000. Dr. Old opined the new injury seemed to have different symptoms. The claimant was having radiation of pain into the leg. Dr. Old testified the pruning incident was a new injury because claimant had pretty well healed up prior to that, but she had an underlying condition that would make it more prone to reinjury.

Dr. Old diagnosed claimant as having degenerative disc disease. But claimant did not have a bulging or herniated disc. Dr. Old testified the claimant's January 2000 incident was a temporary aggravation or exacerbation of her degenerative disc disease in her low back. He didn't feel the claimant suffered any permanent impairment to her back as a result of that temporary aggravation. Dr. Old testified the claimant would be able to do all of the jobs listed in Ms. Terrill's report. He did not place any permanent restrictions on the claimant.

Dr. Mills examined the claimant on December 11, 2000, upon referral by her attorney. Dr. Mills diagnosed the claimant with low back sprain versus SI sprain and felt claimant was having depression. Dr. Mills noted the claimant was going to need physical therapy and chiropractic therapy when exacerbations of her back occurred.

Dr. Mills testified there was a causal relationship between the claimant's current complaints and the reported work activity on January 12, 2000. Based on the AMA Guides, Fourth Edition, Dr. Mills placed the claimant in DRE Lumbosacral Category II impairment which is a 5 percent permanent partial impairment to the whole body.

Dr. Mills placed the following restrictions on the claimant: avoid prolonged or repetitious forward flexion; lift only with good body mechanics; and, avoid twist, bends and lifting as much as possible. In a letter dated February 19, 2001, Dr. Mills further explained his reluctance to impose weight restrictions but agreed 35 pounds would be an appropriate lifting limitation. Dr. Mills opined the claimant is not able to do 7 out of the 22 tasks prepared by Mr. Molski. Lastly, Dr. Mills opined the claimant's hedge trimming incident was not a new accident. Dr. Mills testified the hedge trimming was a temporary aggravation of her underlying problem and claimant would continue to have waxing and waning in severity. The doctor further opined claimant will have trivial things that will cause some problems episodically.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[3]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced

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[1]K.S.A. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[2]K.S.A. 44-508(g). See also *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[3]K.S.A. 44-501(g).

[4]Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

by an independent intervening cause.[5] Under those circumstances the current injury would constitute a new accidental injury and would not be compensable as a direct and natural consequence of the original injury.

It is undisputed that before the January 12, 2000, accident claimant had experienced episodic problems with her back. Following an incident, she would receive treatment, improve and return to work. It is equally undisputed claimant suffered a work-related accident on January 12, 2000. She was provided medical treatment, her condition improved and she was released to return to work without any restrictions. Dr. Old, the treating physician, concluded the January 12, 2000, incident was a temporary aggravation of claimant's degenerative disc disease. Dr. Old further concluded claimant did not suffer any permanent impairment as a result of the incident on January 12, 2000.

On May 18, 2000, after trimming the hedge at home, claimant again experienced low back pain. The following day she returned to see Dr. Old and noted her back pain was more severe than the January 12, 2000, incident. Claimant also experienced pain radiating down into her right leg and sometimes into her left leg.

The dispositive issue is whether claimant's current low back pain is a natural and probable consequence of her January 12, 2000, injury or whether, instead, the hedge trimming incident was a new intervening accident.

After the January 12, 2000, work-related incident, claimant complained of low back pain with no radiation into the legs. After a course of physical therapy, claimant had a normal range of motion and was released to return to work without restrictions. Claimant testified she was feeling really good when she was released from treatment on April 10, 2000. In the interim between her release from treatment in April and the hedge trimming incident on May 18, 2000, claimant testified she felt good and wasn't having any trouble with her back.

After the May 18, 2000, hedge trimming incident, claimant returned to Dr. Old with severely limited range of motion. Claimant had the new symptoms of pain radiating into her legs. Dr. Old testified he ordered an MRI because he expected disc involvement because of the complaints of leg pain. Dr. Old concluded claimant had suffered a new injury because claimant had healed prior to the hedge trimming incident. Significantly, claimant testified her back pain was worse after the hedge trimming incident than it was after the January 12, 2000, incident.

The Board agrees with the treating physician, Dr. Old, that claimant suffered a temporary aggravation of her underlying degenerative disc disease as a result of the

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[5] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997). See also Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

January 12, 2000, work-related accident but did not suffer any permanent impairment. The Board further concludes the claimant aggravated and intensified her degenerative disc disease when she suffered a new, separate and intervening accidental injury while trimming the hedge at her home.

Accordingly, the Administrative Law Judge's Award is modified to reflect claimant is only entitled to the authorized medical benefits and temporary total disability compensation for the January 12, 2000, accident.

Respondent next argues treatment with Dr. Martinez was not authorized and reimbursement for that treatment should be limited to $500 for unauthorized medical treatment.

The claimant's uncontradicted testimony was that the day after the incident at work she had told Mark Britton, the director of the facility where she worked, about the incident where she had injured her lower back. She advised Mr. Britton she was going to the doctor and he did not object but requested she let him know what she found out. After claimant was taken off work by Dr. Martinez, she took the off-work slips to the respondent and continued treating with the chiropractor. When claimant provided the off-work slips she was not told to discontinue treatment. After treatment for two weeks, claimant was then advised respondent was not going to pay for the chiropractic treatment. Claimant was then referred to Dr. Old for additional treatment. Claimant did not receive any additional treatment from Dr. Martinez after being advised respondent would not pay for such treatment.

The treatment with Dr. Martinez occurred after claimant had advised respondent of her injury and her need for medical treatment. Because respondent neither directed claimant to a specific doctor nor initially objected to her receiving treatment from Dr. Martinez, the respondent cannot now assert such treatment was not authorized. The Administrative Law Judge's determination that respondent pay for the treatment with Dr. Martinez is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated October 8, 2001, is modified to reflect the claimant is only entitled to temporary total disability compensation and medical expenses.

The claimant is entitled to 12.71 weeks of temporary total disability compensation at the rate of $308.61 per week for a total of $3,922.43.

The Board adopts the remaining orders contained in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of April 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Martin Updegraff, Attorney for Claimant
Anton Andersen, Attorney for Respondent
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director